IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1127

ROBERT PAUL OBURN, PHILIP D. FAZENBAKER, HALL E. SOLOMON, JR., CLIFFORD P. ARTMAN, STANLEY KOMOSINSKY, MATTHEW CHABAL, Individually and on Behalf of All Other Persons Similarly Situated, and THE CONFERENCE OF STATE POLICE LODGES OF THE FRATERNAL ORDER OF POLICE,

Petitioners,

v.

MILTON SHAPP, JAMES D. BARGER, ISRAEL PACKEL, RICHARD MADISON, ERNEST KLINE, RICHARD ROSENBERRY, Individually and in Their Official Capacity; WILLIAM BOLDEN, III and ALL MINORITY APPLICANTS TO AND EMPLOYEES OF PENNSYLVANIA STATE POLICE,

Respondents,

and

DONALD LUTZ and MICHAEL WARFEL,

Petitioners,

v.

MILTON SHAPP, JAMES D. BARGER, ROBERT KANE, RICHARD MADISON, ERNEST KLINE, and RICHARD ROSENBERRY, Individually and in Their Official Capacity,

Respondents.

WILLIAM BOLDEN, III and ALL MINORITY APPLICANTS TO AND EMPLOYEES OF PENNSYLVANIA STATE POLICE,

Intervening-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR INTERVENING-RESPONDENTS IN OPPOSITION.

ROBERT J. REINSTEIN,
Temple University School of Law,
1715 North Broad Street,
Philadelphia, Pa. 19122

HAROLD I. GOODMAN,
GERMAINE INGRAM,
COMMUNITY LEGAL SERVICES, INC.,
Sylvania House,
Juniper and Locust Streets,
Philadelphia, Pa. 19107

Attorneys for Intervening-Respondents.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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MILTON SHAPP, JAMES D. BARGER, ISRAEL PACKEL, RICHARD MADISON, ERNEST KLINE, RICHARD ROSENBERRY, Individually and in Their Official Capacity; WILLIAM BOLDEN, III AND ALL MINORITY APPLICANTS TO AND EMPLOYEES OF PENNSYLVANIA STATE POLICE, Respondents

and

DONALD LUTZ and MICHAEL WARFEL, Petitioners,

v.

MILTON SHAPP, JAMES D. BARGER, ROBERT KANE, RICHARD MADISON, ERNEST KLINE, AND RICHARD ROSENBERRY, Individually and in Their Official Capacity, Respondents

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BRIEF FOR INTERVENING-RESPONDENTS IN OPPOSITION.

I. OPINIONS BELOW.

The Opinion of the District Court is reported at 70 F. R. D. 549. The Opinion of the Third Circuit Court of Appeals is not yet reported, but is reproduced in Petitioners' Appendix, 13a-14a.

II. QUESTIONS PRESENTED.

The questions presented by the Petitioners far exceed and misformulate the limited issue which is actually involved in these cases. The only question decided by the District and Circuit Courts, and thus the only question properly raised in this Court, is whether Petitioners' actions were impermissible collateral attacks on a prior judicial decree. Neither Court addressed the question which the Petitioners seek to have this Court resolve, i.e., whether implementation of racial goals required by a prior consent judgment violated any federal right of the non-minority Petitioners. Thus, the issue of "reverse discrimination" is not ripe for adjudication. The only question presented is:

> WHETHER THE DISTRICT COURT PROPERLY DISMISSED PETITIONERS' COMPLAINTS ON GROUNDS THAT THEY REPRESENTED IMPROPER COLLATERAL ATTACKS ON A PRIOR COURT JUDGMENT ENTERED IN A CASE OVER WHICH THE DISTRICT COURT CONTINUED TO MAINTAIN JURISDICTION?

III. COUNTER-STATEMENT OF THE CASE.

The *Oburn* and *Lutz* cases represent an overt collateral attack on a prior consent judgment reached in *Bolden, et al. v. Pennsylvania State Police, et al.*, C. A. No. 73-2604 (E. D. Pa.). To place the collateral nature of *Oburn* and *Lutz* in perspective, we briefly describe below the evolution of the *Bolden* litigation.

A. The Bolden Suit.

The *Bolden* suit challenged intentional employment discrimination against minorities by the Pennsylvania State Police and the state officials who were responsible for its employment practices. The racial bias within the Pennsylvania State Police, which had resulted in the virtual exclusion of non-whites from the force, was deepseated and notorious. Not only have there been admissions by the Governor of the Commonwealth, the Lieutenant Governor and the Commissioner of the State Police that a policy of racial discrimination has been practiced by the Pennsylvania State Police since its creation in 1905, but these officials have acknowledged that, although aware of these discriminatory conditions and their duty to remedy them, there was no alteration of the fundamental nature of this illegal and unconstitutional policy*.

B. The Bolden Consent Decree.

On February 12, 1974 the plaintiffs in *Bolden* filed a Motion for a Preliminary Injunction seeking to restrain the defendants from discriminating against minority applicants and employees of the Pennsylvania State Police. Also sought was an affirmative injunction to remedy the effects of past classwide discrimination. The District Court conducted a hearing on that Motion and after nearly three

* These admissions are contained in an extensive Stipulation of Facts entered at the outset of the hearing in *Bolden* on plaintiffs' Motion for a Preliminary Injunction.

weeks of testimony, plaintiffs rested. Almost immediately thereafter, defendants requested and the parties commenced extensive settlement discussions aimed at amicably resolving all class issues raised in the litigation. The result of these negotiations was a comprehensive seventeen (17) page Consent Decree, executed by counsel and approved by the District Court in conformity with Rule 23(e), Fed. R. Civ. P. on June 20, 1974. As expressed in the Decree, the parties' and the District Court's intent was dual-edged: first it was designed to achieve racial integration on and within the Pennsylvania State Police by the hiring and promotion of qualified minorities in the most expeditious manner practicable. Second, it was intended to end the defendants' reliance on invalid (i.e., non-job related) hiring and promotion procedures. To ensure full compliance with the terms and provisions of the Decree, the District Court retained continuing jurisdiction of the litigation.

C. Petitioners' Involvement in the Bolden Consent Decree.

Contrary to Petitioners' assertion, Petitioner, The Conference of State Police Lodges of the Fraternal Order of Police (hereinafter, the F. O. P.) was intensely involved in the *Bolden* lawsuit and the proceedings which culminated in the Consent Decree. In fact, the F. O. P. filed a Motion to Intervene in *Bolden* shortly after the commencement of the hearing on plaintiffs' Motion for a Preliminary Injunction. Before the District Court could rule on intervention, the Attorney General of Pennsylvania appointed the F. O. P.'s counsel as an Assistant Attorney General for the specific purpose of representing the F. O. P.'s interest in the litigation. Thereafter, the F. O. P. was fully represented during the hearing.* After the *Bolden* plaintiffs rested, it

* Not only was the F. O. P.'s interest represented by its own counsel, but also F. O. P. President, Leo Pierce, was present and participated throughout the hearing and the subsequent negotiation discussions.

was the F. O. P.'s counsel who suggested that the parties attempt an amicable resolution of the litigation. He fully participated and was the controlling force in the settlement discussions which followed. That control was further evidenced by his refusal to sign the initial version of the Consent Decree that was submitted to the District Court. Counsel asserted that he was unable to sign at that time because he needed more time to consult with his clients. After consultations, he advised the District Court that he was authorized by the F. O. P. to sign the Decree. As a result, the Decree was approved by the Court, as executed by all parties, on June 20, 1974.* Twelve days later, on July 2nd, counsel for the F. O. P. requested leave of the District Court to withdraw its Motion to Intervene. On July 3, 1974, that Motion was granted.

D. Petitioners' Post Consent Decree Involvement in *Bolden*.

Six months after the execution of the *Bolden* Consent Decree, the F. O. P., and the other Petitioners herein, filed their complaints challenging the constitutionality of the Decree itself.** Yet, even while these separate lawsuits were proceeding, some of the Petitioners sought intervention in *Bolden* to raise a variety of claims. For example, the F. O. P. sought and was granted limited intervention to challenge the procedures used on the promotions which followed the execution of the Consent Decree. Upon Motion, the District Court temporarily enjoined these promotions. After a day-long evidentiary hearing, the

* The full details of the F. O. P.'s involvement are set forth in the Opinion of the District Court denying Petitioners' Motion for a Preliminary Injunction restraining the implementation of the *Bolden* Consent Decree, *Oburn v. Shapp*, 393 F. Supp. 561, at 566-7.

** Petitioners have fully set forth the procedural history of the *Oburn* and *Lutz* cases at pages 10-11 of their Petition and thus we do not repeat it here.

District Court dissolved its temporary injunction, and denied the F. O. P.'s request for a preliminary injunction.

Further indication of the F. O. P.'s utilization of intervention in *Bolden* is that on January 19, 1977, Trooper Gerald Robert Dunn moved to intervene in the *Bolden* action in order to seek reconsideration of an Order entered by the Court on November 29, 1976 modifying the *Bolden* Consent Decree. At the hearing on his Motions, Trooper Dunn testified that he had been requested by his local F. O. P. lodge to seek intervention, that the F. O. P. had provided him an attorney, and that the F. O. P. was paying his counsel fees. Similarly, on January 27, 1977, Trooper Daniel McKnight moved for intervention in the *Bolden* case in order to seek, on his own behalf and on behalf of similarly situated whites, reconsideration of the Court's November 29th Modification Order. He too, was and is, represented by counsel retained by the F. O. P. By means of both the Dunn and McKnight Motions, the F. O. P. sought to raise, with respect to the Modification Order, the very same claim asserted in *Oburn* and *Lutz* with respect to the original Consent Decree, i.e., that the judicial order "reversely discriminated" against non-minorities.

IV. REASONS FOR DENYING THE WRIT.

The District Court's decision, which was affirmed as modified by the Third Circuit Court of Appeals, held the *Oburn* and *Lutz* actions to be impermissible collateral attacks on the *Bolden* Consent Decree. Those decisions are unassailable. Not a single authority cited by Petitioners effectively rejoins the District Court's analysis.

Whatever pretentions the Petitioners may have made to challenging a state statute for purposes of seeking a three-judge court, it is obvious that the focus of Petitioners' attack is the *Bolden* Consent Decree, a consent judgment

reached in prior litigation. As the District Court stated, whatever doubt there may have been regarding the brunt of Petitioners' attack was resolved when the Petitioners explicitly assailed the Consent Decree in their amended complaints. The Petitioners have not alleged, much less proven, that the District Court lacked jurisdiction in *Bolden*. Thus, no tenable argument can be made that the *Oburn* and *Lutz* actions do not collaterally attack a prior judgment.

Whether collateral attacks such as these are maintainable has been address by other courts in almost identical circumstances. In *Black and White Children of Pontiac School System v. School District of Pontiac,* 464 F. 2d 1030 (6th Cir. 1972), where plaintiffs sued to enjoin enforcement of a prior school busing order, the Circuit Court stated:

> Plainly, plaintiffs have mistaken their remedy . . . The District Court has retained jurisdiction of the case. The proper avenue for relief if there were unanticipated problems which had developed in the carrying out of the court's order, was an application to intervene and a motion for additional relief in the principal case. 464 F. 2d at 1030.

A similar result was reached in *Construction Industry Combined Committee v. International Union of Operating Engineers,* 67 F. R. D. 664 (E. D. Mo. 1975). In the instant case, as in *Black and White Children,* the District Court has retained jurisdiction in the action which resulted in the challenged Order. And, as in *Black and White Children,* the avenue for relief is application for intervention and motion for additional relief in the *Bolden* action. Having repeatedly utilized the intervention mechanism

within the context of *Bolden*, the Petitioners can hardly argue the unavailability of this avenue.

The Petitioners' reliance upon *Hansberry v. Lee*, 311 U. S. 32 (1940), is obviously misplaced. First, *Hansberry* dealt with issue preclusion: the plaintiffs had been completely foreclosed by the lower courts from relitigating an issue which had been decided by a prior judgment. Here, the District Court expressly reserved judgment as to whether any of the Petitioners were collaterally estopped or otherwise precluded from litigating any issue. *Oburn v. Shapp, supra*, 393 F. Supp. at 553. Rather, the Court held that whatever issues the Petitioners sought to raise must be presented within the context of the continuing *Bolden* litigation, not through separate lawsuits. Second, the plaintiffs in *Hansberry* had no opportunity to intervene in the prior action, the prior judgment having become final prior to the commencement of their suit. Here, intervention in *Bolden* is not only possible, but it has been utilized by the Petitioners.

Neither *Hansberry* nor any other case cited by Petitioners indicates inconsistency between the District and Circuit Court decisions and the decisions of this Court. Nor do they indicate any rift on the collateral attack issue among the various circuits.

Finally, there is no issue of national importance presented in these cases. Certainly, the determination that these actions are impermissible collateral attacks does not involve ramifications with nation-wide impact. The relative unimportance of the collateral attack issue is not altered by the fact that in bringing these actions the Petitioners sought to adjudicate a "reverse discrimination" claim. The Petitioners may not overcome the fatality of having pursued an improper vehicle for relief by asserting a facially attractive issue on the merits, especially where

the proper vehicle is still accessible. If and when the Petitioners have asserted their "reverse discrimination" claim in the proper procedural context and the lower courts have ruled on their claim, only then will the issue of the propriety under the federal Constitution of the imposition of racial goals pursuant to the *Bolden* Consent Decree be ripe for consideration by this Court.

V. CONCLUSION.

For the foregoing reasons, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT J. REINSTEIN,
Temple University School
of Law,
1715 North Broad Street,
Philadelphia, Pa. 19122

HAROLD I. GOODMAN,
GERMAINE INGRAM,
COMMUNITY LEGAL
SERVICES, INC.,
Sylvania House,
Juniper and Locust Streets,
Philadelphia, Pa. 19107
Attorneys for Intervening-Respondents.